

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-1362

To be argued by
JULIA P. HEIT

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee.

vs.

LAI MONG WAH,

Appellant.

BRIEF FOR APPELLANT

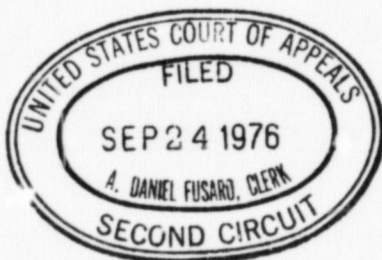
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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v.

LAI MONG WAH,

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Docket No.: 76-1362
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STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered July 27, 1976 in the United States District Court for the Southern District of New York (Brieant, J.) convicting appellant after a jury trial of conspiring to violate Title 21 U.S.C. §173, §174, and §846, and the substantive counts of the importation of heroin in violation of Title 21 U.S.C. §951(a)(1) and §952; distribution and possession with intent to distribute heroin in violation of Title 21 U.S.C. §812, 841(a)(1) and 941(b)(1)(A). Appellant was sentenced to five years on Count 1; 10 years on each of counts 4, 5, and 7, to run concurrently with each other, but consecutively to sentence imposed on Count 1.

Appellant was also placed on Special Parole for 3 years, to commence upon expiration of her confinement.

Appellant is presently incarcerated pursuant to the above judgment of conviction.

QUESTIONS PRESENTED

1. Whether Appellant's due process right to a fair trial and her constitutional right to confront her accusers were violated when the chief Government witness, who had the ability to speak English, gave his testimony entirely through a Chinese interpreter.

2. Whether turning over potentially valuable evidence to the exclusive control and possession of the key government witness during the course of the trial now requires the dismissal of the indictment.

STATEMENT OF FACTS

On June 7, 1976, Appellant and her co-defendant, Cheung Kin Ping, proceeded to trial before the Hon. Charles Brieant on an indictment charging them with conspiring to import and distribute heroin into the United States during a time period which encompassed January of 1970 to December of 1972. This indictment also named three other defendants (Larry Lombardi, Sammy Cho, and Chang You Ching), together with nine unindicted co-conspirators. In addition to the conspiracy charge, the indictment charged 18 counts of various narcotic violations. Specifically, appellant was charged in Count 2 with importing approximately 3 pounds of heroin in January of 1971 in violation of Title 21 U.S.C. Sections 173 and 174; Count 3 charged that she received, concealed, and sold approximately 3 pounds of heroin in August of 1970 in violation of Title 21 U.S.C. Sections 173 and 174; Count 4 alleged that she imported into the United States 5 pounds of heroin in violation of Title 21 U.S.C. Sections 951 and 952; and Counts 5 and 7 charged that in September of 1971, she distributed and possessed with intent to distribute 5 pounds and 1 kilogram, respectively, of heroin in violation of Title 21 U.S.C. Sections 812 and 841.

At the conclusion of the entire case, the court acquitted appellant of Count 3 (1287) and the jury, after deliberating, could not agree on a verdict on Count 2, but convicted appellant of the remaining counts (1294-95).

The only Government witness to connect appellant with any narcotic activity was Yuin Kwei Sang, who testified with the assistance of an interpreter, despite the fact that it became apparent during the course of the trial that he was conversant in English.

Mr. Yuin, who was born on February 22, 1916 in Shanghai, China, travelled to Hong Kong in 1961, but remained there only until 1966, when both he and his wife decided to go to France. Finally, in 1968, he came to New York (17-18). Although he had engaged in narcotic activities prior to 1970, he did not meet Cheung and appellant until early 1970. Appellant worked at the Golden Star Bar, and he also knew her by the names of Wah Je and Gloria. Between March and April of 1970, the three of them would discuss the narcotics business at the Mah Jongg

Club at 16 Bowery in Manhattan. They specifically talked about a sample of heroin which Cheung had received from Hong Kong. Thereafter, the witness had a conversation with Cheung, who told him that he and appellant had decided to import heroin from Hong Kong, and that they each had contributed \$1500 to this endeavor. Yuin also decided to donate an equal amount in order to put their plan into effect (28-29). Accordingly, Yuin, Appellant, Mr. Yip (appellant's common law husband), Sammy Cho, and Loh Ahder accompanied Cheung to the airport and he departed for Hong Kong (28-31).

Cheung thereafter informed Yuin in his subsequent letter that the narcotics would be sent to the United States with people who worked aboard the ships, and that after the goods arrived in the United States, someone would notify the Golden Star Bar (32-34). Yuin claimed that he showed these letters to appellant.

At the end of 1970, when Yuin arrived at the Golden State Bar, appellant and a seaman were already engaged in a conversation. Yuin was informed that the narcotics had arrived (38). They then arranged to meet at the wharf in

Staten Island in order to pick up the goods at about 11:00 p.m. that evening (39). When they arrived at this location, the seaman was already present and was standing next to two cartons. He asked for their assistance in transporting these cartons to the car. However, the gateman wanted to see what was in the cartons so appellant showed him the custom clearance papers (41-42). At that point, they drove to Manhattan and appellant helped him bring the cartons up to his apartment. When the cartons were opened, they found some Chinese foodstuffs contained therein. The narcotics had been placed in plastic bags between the linings of the two cardboard boxes and they found about 20 ounces of white heroin and 60 to 70 ounces of brown heroin (42-3). The drugs were secreted under his sofa for the next few days.

Towards the end of 1970, appellant told the witness that there was a vacant apartment at 133 East 4th Street, where the rent was cheap. The three of them (Yuin, appellant, and Cheung), pooled their money for the rent but he alone signed the lease (44-45, 135).

Yuin subsequently met Dr. Liu at a restaurant in Chinatown. Dr. Liu, who was from Washington, took samples of both the white and brown heroin. Between February and March of 1971, Yuin went to Washington and sold Dr. Liu 22 ounces of the white heroin, and received \$15,000.00 (57). Upon Yuin's return to New York, he informed appellant of the transaction. He then went to the North American Bank and purchased \$10,000 worth of money orders, some of which were given to appellant, and some of which were sent to Cheung in Hong Kong (57-59).

According to Yuin, the brown heroin could not be sold for a long while. Finally, after May 1, 1971, he sold 25 ounces to someone whose name he could not remember, and also to someone named Sammy, but Yuin did not recall the amount of heroin sold. Appellant told him that she had sold a pound of this brown heroin to Lee Louis. She gave him about \$4,000.00 and he in turn gave her the brown heroin (67).

Yuin further testified that Cheung's next letter informed them that he had received the money, and that the next shipment of narcotics would be concealed in coffee tables. In May, Yuin was notified that this shipment

would arrive in July of 1971, and he informed appellant of this fact. Hence, at a designated time, appellant and Yuin met with a seaman, who told them that the narcotics had arrived. It was arranged that the seaman would bring the two coffee tables to the Fourth Street apartment, and in return, he would receive \$1,000.00 (74-5). A few days later, both he and appellant dismantled the tables and found the narcotics secreted in its hollow legs (75). This shipment consisted of approximately 8 pounds of heroin (83). Dr. Liu purchased 8 ounces for \$2,500.00 (87-89).

In the fall of 1971, appellant introduced the witness to Larry, who represented that he could purchase the narcotics. He subsequently bought one-half pound of heroin through appellant. Larry's next purchase consisted of one kilo for which he paid \$18,000.00 (91). On one occasion, both Yuin and appellant went to Larry's apartment, where he taught them how to test heroin (92).

According to Yuin, around September or October of that year, he met Sammy Cho, who said he had 15 pounds of heroin and asked if the witness had any connections to distribute it. Yuin took 5 pounds and comingled it with

the other stuff he had. This amount, together with an additional 10 pounds, was sold to Larry, who was paying \$1,500.00 to \$1,600.00 per kilo. Yuin then paid Cho a total of \$90,000.00 for the 15 pounds of heroin (94). The profit from these transactions was put into a common pool at the Fourth Street apartment. Yuin maintained that they always had \$20,000.00 to \$30,000.00 on hand there (95).

At another point in October, Sammy Cho told Yuin that he would have 20 more pounds of heroin. He informed appellant of this fact and they both decided that whatever profit they could make, they would divide (96). Consequently, after selling the 20 pounds of heroin, they had about \$95,000.00. Appellant was given \$30,000.00; the witness retained \$30,000.00; and the balance was sent to Cheung in Hong Kong (96-98). Yuin explained that he had purchased money orders in December of 1971, which he had sent to appellant in Hong Kong, since she had left for Hong Kong in November of that year (103). Subsequently, he also traveled to Hong Kong and met appellant, Cheung, Sammy Cho, and one other person. They again had discussions concerning narcotics (108-09).

Yuin stated that in October of 1972, he was arrested in Hong Kong, and was ultimately extradited to the United States on November 1, 1974. At this time, he agreed to co-operate with the Federal Government (118). On May 5, 1976, he pleaded guilty to one count of the sale of heroin, and acknowledged that he could receive a sentence of up to 15 years. He did admit that the Government had told him that he could receive a suspended sentence if he co-operated.

Upon cross examination, Yuin denied the following allegations: First, he did not know whether his wife, Chou Ming, had borrowed \$200 or \$300 from appellant; he did not believe that his wife had also requested to borrow \$1,000.00 from her (152). He claimed that he never asked appellant to sign money orders for \$500.00 each as payment for this loan, and likewise denied giving appellant \$1,000.00 in cash in return for the two money orders (158); he did not recall his wife inviting appellant to dinner or their engaging in any discussions concerning going into a legitimate business. He stated that he never told appellant that the \$1,000.00 that she had loaned his wife was already put into a business (154). The witness denied that he had pulled appellant into a building, put a gun to her head, and demanded that if she did not do what he stated, he would kill both her and

Henry Yip; he denied directing appellant to leave a bag of groceries in the last row of the Pagoda Theater. Although he denied forging appellant's names on any of the money orders, he did write the name "Lai" on 6 of the orders which totalled \$3,000.00 (168). Yuin did not know whether his wife had attached a note to appellant along with the money orders, instructing appellant to deposit the money in a Hong Kong bank until she arrived there. When Yuin went to Hong Kong, he denied that he ordered appellant to take \$14,000.00 out of the Hong Kong bank, and give him the money in cash. He did not state that this was the last thing she would have to do for him (170).

At one point during the cross examination of this witness, co-counsel noted for the record that the Witness Yuin understood English. The court responded that he understood a great deal of English (182).

In the midst of Yuin's cross examination, the Government informed the court that it had asked this witness whether he had kept a diary of any kind, and to that the witness responded affirmatively, showing the books to the Government (255). The Government represented that

it did not know specifically what the diary contained, except that it recorded meetings between Yuin and Mr. Taylor, a Special Agent with the D.E.A., and covered the period from January 1, 1976 to the present (256). The Government contended that although it did not consider the diary to be 3500 material, it was nevertheless bringing these facts to the court's attention. Appellant's counsel then argued that there might be material contained therein that could be used for impeachment purposes regarding the recollection of Yuin's conversations with Agent Taylor (257). The court responded that the diary should be made available to the defense, but that it should not be taken out of the United States Attorney's office (257-58). The court, however, agreed with the Government's contention that the diary did not contain 3500 material. Appellant then requested permission to review the diary with the assistance of an interpreter in order to ascertain whether anything contained therein could be helpful to its case. It was also brought to the attention of the court that some of the passages in the diaries were in English (283).

Subsequently, the Government suggested that the diaries be retained by the Government to ascertain whether it contained any Brady material, and that they would submit

anything that fell within that category, and anything that was questionable, to the court (297-98). The court responded that it did not think that the diaries should be given to the defendants' interpreters against Yuin's wishes. The court was of the opinion that Yuin could possibly fear that the diary could get into the hands of those he did not trust, and that certain material contained in the diaries could incriminate him (298-99). Counsel protested, stating that the Government's interpretation of what might constitute Brady material could be quite different from their own (298-300). Counsel also pointed out that the diary contained passages in English which had highly sophisticated, as well as monosyllabic words. Counsel therefore argued that it was important for the jury to judge the sophistication of the writings. The court ruled that such evidence was purely cumulative on that point and that it would not permit it (300-01). The court also ruled that Yuin was entitled to the privacy of his diary and did not have to place it in the hands of the defense absent a voluntary waiver of his rights (301).

At another juncture in the trial, the Government informed the court that it had directed Yuin to go home and pick out any passage that related to his relationship with the Government, or his testimony. The court stated that the witness should do just the opposite - pick out passages which he claimed were privileged. The court opined that the defense was not going to permit a Government witness to select the Brady material (379-80). Counsel then queries whether Yuin had exclusive custody and possession of the diaries, and when the court replied that was its understanding, counsel immediately moved for a mistrial. Appellant's counsel contended that these diaries had been taken away from the defense, who had an interpreter review them. Counsel explained that any line on Chinese hieroglyphics could distort a word. Therefore, to give this potential source of evidence to this witness was unconscionable. The defense also maintained that it had been under the distinct impression that the diaries were to remain in the exclusive possession of the Assistant United States Attorney, Mr. Engel (381). Counsel thus requested that the diaries be removed immediately from Yuin's possession before he could in any way effect a change in the content of the documents (381). Counsel also did not rule out the possibility that

the damage already could have been done, and again asserted that a single line could change not only a word, but an entire paragraph. Counsel stated for the record that he was shocked that the diary had been taken out of the Government's possession after the defense had been directed to return it, and that the witness had exclusive possession of it all night and the next day as well (382).

When the question of the diary again arose, counsel asked for a standing objection to Yui's retaining exclusive possession of this diary. The court admitted that it thought that the agreement had been that it would be possessed by Yui only in the presence of the interpreter or the Assistant United States Attorney. The Government, however, retorted that both he and the interpreter had been in court all day. Additionally, the Government objected to counsel's constant slurs of tampering when there was no indication of this (593).

When all portions of the diary had been turned over to appellant's counsel, counsel informed the court that he had examined portions of the diary and certain words that were in the diary in English, such as the "Witness Protection

Act" and various other statements written in English were no longer there (876-77). Counsel at another point requested that an in camera hearing be held to determine whether pages had been removed from the spiral notebook. The Government retorted that Yuin had claimed that he had not removed any such pages, and the Government had no reason to doubt his assertion. The court interjected it had no basis to form any conclusion on the subject. However, the court did state that it would permit Yuin to be examined in the absence of the jury to determine if he had destroyed any pages. For some reason not appearing on this record, no such examination was ever held (957-959).

NICHOLAS WONG testified that on November 3, 1971 he met with an informant whose name was Sandy at the office of the then Bureau of Narcotics and Dangerous Drugs (446-47). Arrangements were made to make a purchase of heroin and the two men drove to East 4th Street and First Avenue, where they parked the car. The informant left the car and walked towards 80 First Avenue. In a few minutes, he returned with Yuin, who was introduced to him as Frankie Lee (448). The Agent asked Yuin if he could supply him with pure heroin in kilogram quantities. Yuin said that he could for \$20,000 per kilo, or \$9,500 per pound. Yuin also told the Agent that

he could test the heroin himself by using a boiling test, and that the heroin would stand up until the temperature reached 210° Fahrenheit (449). When the Agent asked for the ounce of heroin that he was supposed to purchase, Yuin pointed to the informant who was sitting in the front seat. The informant took an envelope which contained a white powder, and handed it to the Agent (450). Wong then gave Yuin \$650 for that ounce (453).

Thereafter, on November 16, 1971, Wong returned with the informant to Yuin's apartment, but Yuin was not there. They returned an hour later when Yuin was present. He told Yuin that he was not satisfied with the sample of heroin that he had given him, and that he wanted only pure heroin. He then requested another sample of heroin and also insisted that the price of \$20,000 per kilo was too high. Yuin agreed that he could pay \$18,000 per kilo, and \$9,000 for one-half kilo, and that he would give him a sample of pure heroin that evening (454). Wong left the apartment in the company of Yuin and the informant. Yuin then left and when he returned to the car, he gave Wong a sample of heroin, which he claimed was pure, and represented that he could supply heroin on a regular basis with short notice (455).

Agent Wong further testified that on November 17, 1971, he rang the intercom at 80 First Avenue, and it was answered by a woman. He waited outside the building for about 45 minutes and then saw Yuin walking down First Avenue. Wong told Yuin that he was satisfied with the purchase, and that he wanted to purchase one-half kilo of heroin. Yuin asked if he had the money, and the Agent replied that he did. Yuin then asked to see the money. Whereupon, Wong removed \$9,000 from under the front seat of the car, which he showed to Yuin. At that point, Yuin said that he would go and get the heroin. A few minutes later, he returned with a brown paper bag and said that there was 17 ounces of heroin in the bag. Yuin stated that although it was one-half ounce short, he would make it up on the next buy. However, Wong insisted that he wanted this other half ounce immediately. Yuin left and returned shortly thereafter with a full ounce of heroin, and stated that the Agent now owed him money for the extra half ounce (460). Wong admitted that he communicated rather well with Yuin during the transaction and seldom had a problem, although interpreters were used a number of times (512-13).

TING LEE FONG testified that he became a seaman when he was in Hong Kong and as a sailor, he had occasion to travel to every port. After arriving in Hong Kong, he met a person named Ka Chung Fuk, who had also been a seaman. The two men met again in the beginning of 1971 at the Mah Jongg Club in Chinatown in Manhattan. There Ka introduced him to Cheung, and they both went to a coffee shop. From the coffee shop, they went to a movie house where they discussed narcotics (596).

In the beginning of 1972, Ting received a telephone call from Ka, who told him that Cheung was in Hong Kong, and that he was to meet him in a coffee shop near a wharf (600). Accordingly, Ting met the two men there, and they had another discussion regarding narcotics. Ting maintained that he wanted \$500 for carrying the drugs, but Ka and Cheung said that they would pay him only \$300. However, Ting insisted that he be given \$1,000 first. The two men then asserted that if Ting put in \$500, he could receive 2 pounds of heroin. Two weeks later, the men engaged in an additional discussion about narcotics. Cheung said that whenever Ting arrived in the United States, he should call them so that they could take delivery of the narcotics (602-03). They also instructed him to strap the powder on his body to

bring it ashore. Ting was additionally given a telephone number and was told that it was Cheung's number. He told the men that he would call them when his boat, the Laomedon, arrived in Panama (603-07). Hence, before his ship left Hong Kong, Ka called him to determine when it was leaving and Ting said in the middle of February. Ka then informed him that the narcotics would be delivered the day before the ship left (608). Accordingly, Ka, a woman, and another man, delivered 2 packages containing narcotics (61). When the ship arrived in Panama, Ting telephoned Cheung and told him the day that the ship would arrive in Miami and requested that they should come to Miami to pick up the narcotics. Finally, the ship arrived in Miami on April 5, 1972 (613). After meeting Cheung and Cho, it was arranged that they would receive the narcotics that evening. Cheung and Cho warned him that if the bright headlights on the car were shining, he should not bring the stuff down, but should rather return to the ship (615). Since Ting did not see any bright headlights on the car, he brought the narcotics to them, and observed the parcel being placed in the trunk. He then returned to the ship and was thereafter placed under arrest (617).

According to Ting, when he was in a jail cell with Cheung around May 13, 1972, Cheung told him that if he had to go to court that he should not say anything about him. He told him to talk about Wah Je and Mr. Yuin, both persons he did not know. Thereafter, Cheung instructed him not to talk about those two persons, but to talk only about Sammy Cho. Cheung claimed that if he would give such a story, he would send \$200 a month to his family in Hong Kong. Finally, Ting admitted that he had pleaded guilty to the importation of heroin, and had received a 3 year sentence (627).

SPECIAL AGENT TORRES with the D.E.A. testified that on April 5, 1972, he had been a custom patrol officer in Miami, Florida and had a Chrysler automobile containing two Oriental males under surveillance (568). They were in the vicinity of a ship named Laomedon (568-69). He then observed another Oriental coming off the gangway of the ship, and noted that he was carrying a brown suitcase. The suitcase was placed in the trunk of the car and the Oriental then returned to the ship (569). Torres then approached this vehicle and identified himself as a custom officer, and asked the driver where the suitcase was (570). The Defendant Cheung was sitting in the passenger side of the

vehicle. When the trunk was opened and the 2 men refused to turn over the key to the suitcase, the Agents ripped one corner of the suitcase and observed a number of plastic bags containing a white powdery substance (573-74).

SPECIAL AGENT CSUKAS testified that he interviewed both Cheung and Cho after they had been placed under arrest. After being advised of his constitutional rights, Cheung told him that he would identify the man who had brought the suitcase off the ship. After boarding the ship, Cheung identified Ting (780-81).

Although the jury was instructed that it was not binding on appellant, the Agent Morphus was permitted to testify that Cheung dialed two telephone numbers after his arrest, one of the numbers being Yui's, and the other, appellant's (853, 876-77).

APPELLANT, who was born in 1926, testified that she was presently living in Asbury Park, New Jersey with her common law husband, Henry Yip. She and Mr. Yip had been living together since 1968. This witness had never before been convicted of a crime and had never been arrested prior to the present incident (997). According to appellant, she was then both an employer and a partner in the Go Shing Restaurant in New Jersey. She had invested \$6,000 in this business, and had entered into a partnership with Mr. Yip, who was the manager of this establishment (1038-39).

Appellant testified that she knows Mr. George Yuin as Chou Ming and met her at a wedding in Chinatown in 1969. In 1970, Chou Ming introduced her to her husband, Yuin, when she brought him to the Golden Star Bar. Appellant at that time was an employee and shareholder in that bar, an interest which she sold in 1971 (999).

Appellant asserted that Mrs. Yuin would frequently ask her to lend her money. Two months after their initial meeting, Mrs. Yuin borrowed \$200, but that money was paid

back two weeks later. She borrowed still another \$300 a few weeks later and also returned this sum (999-1000). At the end of 1969, Mrs. Yuin asked to borrow \$1,000. When appellant replied that she did not have the money, Mrs. Yuin started crying and stated that she needed the money for her six children in Hong Kong. Appellant said that she would borrow the money from friends, and subsequently, she loaned Mrs. Yuin the amount requested.

A few weeks later, the Yuins invited her to dinner at their home on First Avenue. After dinner, Yuin asked her to join him in business, but she responded that she did not have money to go into business, and also insisted that she did not know much about business (1000-02). In another few weeks, she was again invited for dinner. Yuin for a second time asked her to go into business with him. She again refused, giving him the same answer she had on the previous occasion (1003). On this very same night at about 4:00 a.m., Yuin came to the Golden Star Bar where she was working and told her that he wanted to wait for her (1003). He then walked with her to a bus stop in front of the Pagoda Theater, and they took a bus to Third or Fourth Street. As she started to cross the street, Yuin

grabbed her, pushed her through a door of a building, and demanded that she go up to an apartment with him. Despite her refusals, he pushed her into the apartment. Because it was so late and a commotion ensued, the landlord opened the door to inquire what was happening. Yuin said something and pushed her down on the sofa in his living room. According to appellant, Yuin said that he did not intend to scare her, but that he had asked her twice to go into business, and twice she had refused his offers (1005). He showed her a gun and threatened that he could then easily kill her and that the gun would not make any sound. He admonished her that if she did not comply with his wishes, he would attack Yip, and then attack her. He also told her not to tell anyone, including the police, what happened (1006).

Appellant further testified that Yuin thereafter called her at the Golden Bar and asked her to wait for him at the Pagoda Theater. Because she feared for her life, she followed his instructions (1007). They met at the theater and Yuin directed her to follow him into a bar. He ordered her to carry a bag containing groceries (1009). She left the bar with Yuin, but they left the bag of groceries in the bar (1010).

Yuin again appeared at the Golden Star Bar at 4:00 a.m., and when they proceeded to First Avenue and Fourth Street, Yuin took out some checks and demanded that she sign her name on them. Although she did not want to comply with his demands, she did so because of his continual threats. After signing the checks, he placed some money on the table and told her that this money was from the profits of their business, and she could spend it as she deemed fit. When she retorted that she did not want the money, Yuin accused her of being a very stupid woman (1017).

In 1971, Yuin again directed her to meet him at the Pagoda Theater. When she arrived at the theater, he was carrying a bag of groceries which was eventually left in the theater. When she questioned Yuin about what had happened to the groceries, he accused her of being too troublesome and of asking too many questions (1019).

Thereafter, in October or November of 1971, Yuin gave her two checks and told her to sign her name on them. He said that this represented repayment for his wife's loan. However, he then gave her \$1,000 in cash and took the two

checks back. Yuin then told her that he had learned that appellant was going to Hong Kong. I told her that he and his wife would soon be going to Shanghai to see her children (1022).

Finally, in November of 1971, appellant stated that she went to Hong Kong with Henry Yip. When she was there, she received a letter containing some checks, together with a note from Mrs. Yuin. The checks totalled about \$14,000, and Mrs. Yuin directed appellant to deposit the money in a bank in Hong Kong until Yuin arrived. Appellant did as directed and placed the money in the bank under her name, Lai Mong Wah Tai (1023). This occurred around the end of December (1025).

Subsequently, she met with both Yuin and Cheung in Hong Kong. A few days after this initial meeting, Yuin said he wanted the money. She therefore got the \$14,000 from the bank, and gave it to him. She stayed in Hong Kong for three months (1032).

Appellant further testified that when she returned to the United States, she applied for a job in a factory, where

she worked until September of 1972. She worked 10 hours a day, 5-1/2 days a week, and earned from \$130 to \$150 per week. She then commenced working in the Go Shing Restaurant in New Jersey with Henry Yip (1038-39).

Appellant vigorously denied that she had discussed with anyone means or methods of bringing heroin from Hong Kong to New York. Moreover, she never discussed distributing narcotics in New York or elsewhere. She asserted that she never went to Staten Island; that she never helped Yuin with any crates there; that she never participated in disassembling any coffee tables; that she did not know any Larry Lombardi, and was never in his apartment; and finally, that she never attempted to distribute narcotics (1047).

ARGUMENT

POINT I

APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL AND HER CONSTITUTIONAL RIGHT TO CONFRONT HER ACCUSORS WERE VIOLATED WHEN THE CHIEF GOVERNMENT WITNESS, WHO HAD THE ABILITY TO SPEAK ENGLISH, GAVE HIS TESTIMONY ENTIRELY THROUGH A CHINESE INTERPRETER.

This case presents the novel question of whether a defendant has a constitutional right to have the jury hear the Government key witness testify directly in English, rather than through an interpreter where this witness had demonstrated his ability to speak English by conversing with Government Agents; where the witness' own diary was bi-lingual; and where appellant's conviction was predicated solely upon the word of this particular witness. We assert that a defendant in a criminal action does have such a right.

There was ample evidence throughout the testimony of Yui that he was quite capable of conversing in English and did not necessarily need the assistance of an interpreter. At one point in the trial, co-counsel even brought it to the court's attention that Yui understood English

quite well, and the court responded that indeed he did. At another point, appellant's counsel pointed to the sophistication of Yuin's writings in the English language. And, of course, there was considerable testimony by Government Agents that Yuin could in fact speak English.

We submit that on the facts of this case where appellant's conviction was predicated entirely upon this witness' testimony, appellant was denied her due process right to a fair trial and her constitutional right to confront her accusers when the jury was permitted to hear his version of the facts second hand -- through a Government interpreter.

By having to hear all of the complainant's testimony through an interpreter, appellant suffered undue prejudice. It was virtually impossible for counsel to effectively cross examine this witness, since he could not demonstrate that any inconsistencies in his testimony were due to an actual error or mistake on the part of the witness, rather than attributable to an inaccurate translation. In fact, at one point, the Government even protested the inaccuracies of the interpretation of Yuin's answers.

upon cross examination. The Government argued that the witness did not understand the questions regarding the circumstances of his extradition to the United States, and maintained that the interpreter had given incorrect translations. Clearly, such an occurrence supports our conclusion that the jury could not determine whether such inaccuracies were due to bad interpretations or simply Mr. Yuin's many lies. The jury could make such a determination only by hearing Yuin give his testimony directly in English.

While we are well aware that situations do exist where the witnesses against the defendant cannot speak or understand English and therefore require the assistance of an interpreter in order for the trial to proceed, the present case is clearly distinguishable. First, this witness had already demonstrated his ability to speak, understand, and write English. There was no reason whatever for the court to have perfunctorily assigned an interpreter to assist him. At the very least, it was incumbent upon the court to hold a hearing to determine the true extent of this witness' ability to converse in English. Although admittedly testifying with the aid of an interpreter might have been easier or more convenient for Mr. Yuin, appellant's due process right to a fair trial cannot depend upon the convenience of any one witness. Second, we must

again emphasize that had there been other evidence in this case connecting appellant with the crimes charged, other than this witness' testimony, then perhaps what occurred in this case could have been deemed harmless error. However, where appellant's conviction was based solely upon the word of this one witness, she should have been entitled to have the English speaking jury hear Yuin's testimony directly from him, rather than second hand through an interpreter whose services were not at all necessary. Although references were made throughout the trial to Yuin's ability to communicate in English, it is admitted that counsel made no application to bar the interpreter. However, it is submitted that the issue in this case rises to the level of constitutional dimension and therefore the court sua sponte should have made the requisite inquiry into Yuin's ability to communicate in English. We would point out that a defendant's right to be present at every stage of the proceedings against him, and to confront his accusers is implicit in the notion of a fair trial and is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965). A necessary corollary of this right of confrontation is the

defendant's right to have the jury hear the facts straight from the witness' mouth. A defendant's right of confrontation is meaningless if the jury is unable to judge the results of that confrontation. The jury should not be deprived of the opportunity to judge for themselves the witness' answers to critical questions asked by the defense. It is no answer to this particular argument that appellant, too, needed the assistance of a Chinese interpreter. The focal point of this issue is the defendant's right to present the jury firsthand with the facts, since the jury is charged with the ultimate responsibility of determining the critical question of culpability. Counsel can choose an interpreter that can accurately relay the testimony to his client. It is an entirely different matter for the jury to be able to judge the testimony of the only witness against appellant firsthand.

Therefore, under the facts of this case, this Court should order a new trial with directions that Mr. Yuin, the sole witness against appellant, be compelled to testify in English.

POINT II

TURNING OVER POTENTIALLY VALUABLE EVIDENCE
TO THE EXCLUSIVE CONTROL AND POSSESSION OF
THE KEY GOVERNMENT WITNESS DURING THE COURSE
OF THE TRIAL NOW REQUIRES THE DISMISSAL OF THE
INDICTMENT.

As demonstrated in Point I, appellant's conviction was predicated solely upon the testimony of George Yui. In direct opposition to his allegations, appellant, who never before had any difficulties with the law, and who had always been a hard working member of the community, vehemently maintained that she had been coerced at gun point to comply with Yui's many demands. She thus performed the acts required of her only to save both her own and Henry Yip's lives. In this context, it was crucial that appellant be entitled to inspect every piece of information that could conceivably assist her in her defense and demonstrate before the jury that Yui was totally unworthy of belief. The outrageous chain of events surrounding Yui's diary substantially interfered with her right to present such a defense, and must be construed as a direct violation of the long standing requirement of Brady v. Maryland, 373 U.S. 83 (1963). United States v. Morrell, 524 F.2d 550 (2d Cir. 1975).

Upon the Government's disclosure that Yuin kept a diary regarding his conversations with Government agents, appellant's counsel made an immediate demand to inspect said diary. Because the diary was written in both Chinese and English, appellant's counsel needed the assistance of an interpreter to review its contents. Initially, the diary was turned over to the defense, but shortly thereafter, the court directed the Government to retain possession of this potentially favorable piece of information. At the outset, we would take strong objection to the court's ruling in this instance. Although the question of appellant's culpability was in issue and her liberty was therefore at stake, the court was of the erroneous impression that Yuin's right of privacy to his supposed confidential memoirs should not be invaded by the defense. Surely, the defendant's right to information which may be favorable to her defense, should take precedence over any alleged right of privacy of any Government witness. This is especially true when there was no basis in this record to support the court's conclusion that the contents of the diary might endanger Yuin or his family in Hong Kong, or that he might incriminate himself. Yuin, by testifying for the Government, had already assumed that risk, and the right of cross examination cannot be foreclosed

upon such a specious basis. Alford v. United States, 282 U.S. 687 (1931); Smith v. Illinois, 390 U.S. 129 (1966); cf. United States v. Miles, 480 F.2d 1215 (2d Cir. 1973); United States v. Turcotte, 515 F.2d 145 (2d Cir. 1975).

Continuing with the unfortunate scenario that was to follow, it was therefore decided that Yuin should also review the diary with the assistance of the Government interpreter or in the presence of the Assistant United States Attorney. However, for some inexplicable reason, the Government gave Yuin exclusive custody and control of the diary for an entire evening and for part of the next day. Before turning the diary over to him, the Government did not even take the simple precaution of xeroxing the contents of this diary so that there could be no claim of a witness tampering with potential evidence.

After learning of these events, counsel expressed both his shock and outrage that Yuin was permitted to retain possession of the diary, and promptly moved for a mistrial. When the court queried that it was under the impression that Yuin would retain possession of the diary only in the presence of Government personnel, the Government's retort was that they did not have the time to supervise

him. Counsel then noted for the record that portions of the diary that had been in English were now missing. Counsel also alleged that one line in the Chinese hieroglyphics could change not only the meaning of a word, but the meaning of an entire paragraph.

Such uncalled for tactics on the part of the Government, be it deliberate or otherwise, put appellant in an impossible position. Because she was not permitted to make an initial inspection of the diary, she could not affirmatively prove that anything in fact had been removed. She could rely only on her counsel's naked assertion as to what he believed had been contained in the diary.

In no other case that counsel could find was a witness ever given exclusive control of what could have been an important source of evidence. While the court agreed to an in camera examination of Yuin, such a hearing would have been futile. It would defy reality to expect Yuin to admit that he had in fact tampered with this evidence. Given Yuin's criminal propensities, as were revealed during the trial, his credibility did leave something to be desired.

Hence, it is submitted that the Government must now be held accountable for the suppression or destruction of evidence that could have been material or favorable to appellant's case. Brady v. Maryland, supra. Ordinarily, the standards for granting a new trial on this issue vary according to the extent of the Government's culpability. The aforementioned facts amply demonstrate that the present case must fall within those categories of cases where the prosecution has played a key role in suppressing or ignoring evidence that might have been favorable to the accused. United States v. Kahn, 472 F.2d 272 (2d Cir. 1972); United States v. Keogh, 391 F.2d. 138 (2d Cir. 1968). This case does not fall within those cases where the Government's actions were merely inadvertent or negligent. United States v. Rosner, 516 F.2d 269 (2d Cir. 1975); United States v. Siejo, 514 F. 2d. 1357 (2d Cir. 1976); Grant v. Alldredgem, 498 F.2d 376 (2d Cir. 1974); United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1959); United States v. Morrell, supra; United States v. Miranda, ____ F.2d. ____ (2d Cir., decided 12/3/75).

Because of the Government's actions in turning over the diary to Yuin without first permitting the defense to thoroughly examine said diary, appellant is at a loss to now demonstrate whether anything contained therein was favorable to the defense, or establishing the even more stringent standard of proving that the contents of the diary would have induced the jury to have a reasonable doubt as to her guilt.

The only recourse thus available to appellant to rectify this egregious wrong, because of the Government's actions, is to seek the drastic action of the dismissal of the instant indictment. At this point in time, it can never be proved what the diary contained. In answer to this contention, the Government cannot fairly argue that we are asking this relief predicated upon sheer speculation. It is the Government that put the defense in such a position by giving the witness exclusive control of a potentially valuable piece of evidence, and the Government must now bear the consequences for such an outrageous act.

Finally, we will indeed speculate upon what the diary could have revealed. Yuin could very well have

written down a number of incriminating statements that would not only have embarrassed him, but the Government as well -- never realizing that he would have to produce said diary at trial.

Therefore, under the unique circumstances of this case, appellant requests that this Court take the drastic action of dismissing the instant indictment.

POINT III

PURSUANT TO THE RULES OF THIS COURT, APPELLANT ADOPTS ALL RELEVANT ARGUMENTS OF CO-DEFENDANT.

CONCLUSION

IN ACCORDANCE WITH POINT I, APPELLANT'S CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED; IN ACCORDANCE WITH POINT II, THE INDICTMENT SHOULD BE DISMISSED.

September, 1976

Respectfully submitted,

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UNITED STATES O COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

LAI MO, G W. H.

Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York
That on the 24th day of Sept. 1976 at 1 Saint Andrews Plaza New York, N.Y.

deponent served the annexed *brief*

upon
Robert Fiske, Jr., Attorney General Southern District

the Respondent in this action by delivering *2* true copy *sthereof* to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 24th
day of September 1976

Beth A. Hirsch

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Victor Ortega
VICTOR ORTEGA